REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CENTRAL REGISTRY

ORIGINATING SUMMONS NO 87 OF 2014

JAMES S KINYANJUI……………..………………………………PLAINTIFF

Versus

GATITU WANG'OO& CO ADVOCATES…………….…..…1ST DEFENDANT

MACHARIA & CO ADVOCATES………..…………………..2ND DEFENDANT

RULING

Release of Funds

[1] I have the Plaintiff's Originating Summons (OS) dated 6th March 2014 for determination. The OS seeks for orders *inter alia*;

1. **THAT the sum of Kshs 1,200,000/- together with all accrued interest thereon held in Chase Bank Kenya Ltd in a joint interest earning Account No 11092004 in the name of Macharia & Co Advocates and Gatitu Wang'oo & Co Advocates be released to the Plaintiff herein through his advocates Kahuthu & Kahuthu Advocates forthwith.**

2. **THAT the costs of the application be provided for.**

3. **THAT such other and further relief be granted as this Honourable Court may deem fit and just to grant in the circumstances of this matter.**

[2] The application is expressed to be, brought pursuant to the provisions of Order 37 of the Civil Procedure Rules, Section 1A of the Civil Procedure Act and all other enabling provisions of the law. It is premised on the grounds that; by consent of the parties, the Plaintiff had deposited the sum of Kshs 1,200,000/- as security for the claim against him on 12th August 2010. On 29th June 2011 he received a letter from the firm of advocates representing the claimants, stating that they had agreed to settle the claim at Kshs 1,000,000/- .The Plaintiff fully settled the claim against him in the sum of Kshs 1,035,498/- through the firm of M/S LKKarori& Co Advocates, and therefore, the sum of Kshs 1,200,000/- deposited in the joint interest earning account in the names of the advocates for the parties should be released to him forthwith. Accordingly, there is no reason why the deposit held in the joint account, together with accrued interest, should not be released to the Plaintiff. The Applicant viewed the 1st Defendant's refusal to execute necessary authorization to facilitate the release of the said depositas being actuated by malice, and in any event unjust and unreasonable.

[3] The application was further supported by the affidavit of the Plaintiff sworn on 6th March 2014 in which he reiterated the grounds set forth above. In the submissions dated 16th July 2014 filed on behalf of the Plaintiff, it was contended that the suit had been compromised and settled, as a result of which the monies held as security in the joint interest earning account in the names of the advocates representing the parties should have been released to the Plaintiff. It was further submitted that these monies did not belong to the 1st Defendant, and that if he had any claim for unsettled fees, the same could be addressed by filling a Bill of Costs as against his clients, who had chosen to settle the matter with a different advocate. The Plaintiff responded to the 1st Defendant's submissions and urged that the present application was neither *sub judice* nor *res judicata*.

The 2nd Defendant supported the application

[4] The 2nd Defendant filed its submissions dated 10th September 2014. It was submitted that the claimants were legally justified in appointing an advocate of their choice to represent them in the instant matter, and that any fees recoverable from them by their former advocates could be through filing his Bill of Costs. It was further submitted that the amount of Kshs 1,200,000/- held in the joint interest earning account as security should be released to the Plaintiff, as there was presently no outstanding claim against him. It was submitted that the actions by the 1st Defendant were ulterior, malicious and meant to deprive the Plaintiff of his money, and that the filing by the 1st Defendant of the applications dated 10th and 14th April 2014 in the subordinate Court further demonstrated that the 1st Defendant's actions were not only imprudent, but also contemptuous of the due process of the Court.

The 1st Defendant opposed application

[5] The application was opposed. A Notice of Preliminary Objection dated 14th March 2014 and the Replying Affidavit sworn on even date were filed. The 1st Defendant's contended that the application was incurably defective, misconceived and bad in law, and is an abuse of the process of the Court in that the same was both *res judicata* and *sub judice*. It was further deposed to that the orders sought in the present application had been denied in one of the matters pending between the parties and that M/S L.K.Kirori, who were not on record for the claimants, could not compromise and settle the said matters. Further, it was deposed to that the orders sought were contrary to banking law on privity of contract and that the bank had not been made a party to the suit. In the Further Replying Affidavit sworn on 8th July 2014, it was deposed to that there were similar applications before both this Court and the subordinate Court, and that therefore the instant application was both *res judicata* and *sub judice*.

[6] In the two (2) submissions dated 16th July 2014, it was submitted that the consent dated 12th August 2010 was in relation to **CMCC No 2864 of 2006**and **Judicial Review Misc App No 16 of 2009**and that the deposit was security of the claims therein, and that in the event that the claimants had been successful in their claim against the Plaintiff, the said monies were to be released to the claimants' advocates for onward transmission and settlement of the claim. It was submitted that the advocate who later supposedly represented the claimants did not file a Notice of Appointment or Change of Advocates and could therefore not compromise or settle the suit. Further, it was submitted that the matters had not been marked as settled, and therefore the deposited monies cannot be released without a determination of the suit and that the Plaintiff was attempting to obfuscate the issues.

[7] The 1st Defendant further submitted that the matters in contention were complex, and could not be determined by the instant application. They relied on the cases of **Tayiba Ahmed Taib Bajer v Swaleh Salim Mohamed Bajeber [2005] eKLR** and **Siasa Pashua& 2 Others v MbarukKhamis Mohamed & Another [2012] eKLR.**It was also submitted that the Plaintiff had made similar applications in both the subordinate Court and this Court, and that the matter was therefore *res judicata*, and because there were similar applications pending hearing and determination in the subordinate Court the present application is *sub judice*. They cited the case of **R v Business Rent Tribunal & 3 others *ex-parte* Christine Wangari Gachege [2014] eKLR**to show that the instant application is an abuse of the process of the Court. See also the 1st Defendant's submissions in Reply dated 23rd September 2014.

DETERMINATION

[8] All parties are agreed that the deposit of Kshs 1,200,000/- was made in a joint interest earning account in the name of Macharia & Co Advocates and Gatitu Wang'oo& Co Advocates. In the consent dated 12thAugust 2010, several matters were cited therein; (i) CMCC No 2864 of 2006, (ii) Misc Civil App No 16 of 2009, (iii) Land Dispute Tribunal No LND/16/20/22 of 2008 and (iv) Land Case No 8 of 2008, which formed part of the claim against the Plaintiff. However, the 1st Defendant claims that the deposit was only in relation to **CMCC No 2864 of 2006** and **Misc Civil App No 16 of 2009.** See page 1 of the 1st Defendant's submissions on the P.O submissions and further at pg. 2 of the 1st Defendant's submissions on the Plaintiff's application dated 6th March 2014).

[9] The point of divergence among the parties is as follows; whereas the Plaintiff and the 2nd Defendant contended that matters herein had been compromised and settled, the 1st Defendant claimed that they still subsisted and are yet to be determination. According to the Plaintiff and the 2nd Defendant, the claim against the Plaintiff had been settled, except through a different firm of advocates other than the one on record. This was evidenced in the letter by the firm of M/S L.K.Karori & Co Advocates dated 26th July 2011 which reads in part;

> **"This letter confirms that as per your schedule we have paid a sum of Kshs 1,035,498/- to all your former employees who have duly received and acknowledged receipt of the same. We did send the Certificates of payments and your employees have no claim against you as per the certificates."**

The Certificates of payments were annexed at pages 6 -81 of the Plaintiff's affidavit, with the schedule of payments and list of employees as paid annexed at pages 82-83 and 84-85, respectively. The Plaintiff's advocate in the letter dated 21st July 2011 duly informed the 1st Defendant that payments had been made to the claimants through the firm of M/S L.K.Karori & Co Advocates who had been instructed to act on behalf of the claimants. It would therefore be deemed by inference and by conduct of the parties i.e. the Plaintiff and the claimants, that the matter had been amicably settled out of court, and that the suit was therefore settled. #

[10] The 1st Defendant in a letter dated 8th July 2011 addressed to the firm of M/S L.K.Karori & Co Advocates sought clarification on the latter's representation of the claimants, and whether they would undertake to pay the 1st Defendant's outstanding legal fees. It was the 1st Defendant's contention that since no Notice of Appointment or Change of Advocate had been filed by the said firm, they were still on record as acting on behalf of the claimants, and had not been instructed to compromise or settle the suit out of court. Further to the above, and in a letter dated 11th May 2011, the 1st Defendant reiterated that an application to set aside the consent had been struck out on 7th April 2011, and that therefore the stay order issued on 2nd October 2009 had been lifted, which means that they still acted on behalf of the claimants. They submitted further that the actions by the Plaintiff were an elaborate fraud to defeat justice and avoid paying the decretal sum.

[11] I note that the firm of M/S LKKarori& Co Advocates had further written a letter dated 29th June 2011 to the Plaintiff, in which they intimated that they had been instructed by the representatives of the claimants to act on their behalf. The Plaintiff in the letter dated 29th June 2011 responded as follows;

> **"I confirm that the amount would be paid on or before Monday July 4th 2011. Further you will be advised before Friday 1st July 2011 of the amounts due to each of your clients accordingly."**

The firm of M/S LKKarori& Co Advocates responded in the letter dated 26th July 2011 and acknowledged that they had received and paid out the sum of Kshs 1,035,498/- in full settlement and satisfaction of the claimants claim against the Plaintiff.

[12] I must admit that this case raises critical matters that impinge on eminent practice of law. It is sad to note that the noble practice among practitioners of law where counsel would seek a ''no objection'' from the outgoing counsel has been thrown out of the window. Intervention as the one sought in this application would have been avoided had counsels herein followed the upright path set by the law, professional conduct and etiquette. Nonetheless, issues as to whether the firm of M/S LKKarori& Co Advocates was the duly appointed advocate to represent the claimants or their representatives or that the claimants were paid in full and final settlement, are matters which are entangled in factual mess. I also discern that ''outstanding fee to the 1st Defendant'' is the major objection for the release of the funds in issue. I think that, a proper judicial resolution on instructions and outstanding advocates' fee would only be obtained within the legal framework provided in the Advocates Act and Advocates (Remuneration) Order on rendering of advocate-client bill of costs, taxation and recovery thereof. This suit may not be the correct channel to resolves such issues and the court may also not be competent to address the issue of advocate-client costs. On appointment or change of advocates, it may be easy to look at the record and hold that there is no notice of appointment or change of advocates that was filed by/S LKKarori& Co Advocates. But, that will not resolve the issues being raised herein or sanctify the court to order a release of the money herein. The claimants herein or their representatives are not parties in this suit. I should think the entire matter should be determined among all the parties in the parent suit where the funds were deposited rather than in this OS. The procedure of OS is prescribed for matters which are not convoluted and which may be determined in a summary manner through affidavit evidence. I do not think the issues herein are of such clear character which I can resolve in such limited procedure. See what Havelock,J (as he then was) stated in **most Application No 471 of 2012 Lumumba MummaKaluma v SachinShaha; (2013) eKLR** about situations where representation is an issue *inter alia*;

> **"I do not consider that it is within the purview of this Court to go into whether instructions were given or not given by the Client/ Respondent to the Applicant/Advocates herein. The matter before this Court is as regards the Preliminary Objection. The issue of whether instructions were given or not, is purely factual and a matter of evidence not a point of law"**

[13] There is yet another twist on the matter. There are numerous offshoots of the original matter. Emanating from the claim in CMCC No 2864 of 2006 were; (a) Misc Civil App No 16 of 2009 dated 3rd March 2009 withdrawn on 16th September 2009;(b) the application dated 2ndOctober 2009which was struck out;(c) application dated 1st September 2011 by the Plaintiff seeking release of the funds (see para 12 of the Supporting Affidavit); (d) Notice of Motion application by the 1st Defendant dated 14th April 2014 (marked as "MGW-5" in the 1st Defendant's Replying affidavit) also seeking the release of the monies deposited; (e)application dated 13th April 2012 by the Plaintiff seeking release of the deposit (marked as " MGW-1" in the 1st Defendant's Further affidavit at pg. 1); (f) application dated 26th September 2011 by one of the claimants seeking the condemning of the Plaintiff to pay the costs in **Misc Civil App No 16 of 2009** and further the release of the monies to the 1st Defendant (marked as "MGW-5" in the 1st Defendant's Further Affidavit at pg. 15); and (g) application dated 14th April 2014 by the 1st Defendant also seeking for the release of the deposit in the joint account to itself.

[14] Of the seven applications made, one was withdrawn and another struck out, apparently on a technicality, and no appeal was preferred. That leaves five (5) applications pending hearing and determination, all of which seek the release of the held deposit to either the Plaintiff or the 1st Defendant. The applicationdated 1st September 2011 was struck out by the subordinate Court on an apparent technicality, but the Plaintiffhad sought prayers for the release of the monies deposited in the joint account in favour of the Plaintiff. See paragraph 12 of the Supporting Affidavit. The above mix simply compounds the issue of release of the funds herein. It is not even possible, without all the files and parties before me to say whether the issue has been dealt with by a Court of competent jurisdiction, or is pending before a court of competent jurisdiction. The possibility of this application offending rules on *res judicata and subjudice. Res judicata* is not remote. There are ample judicial decisions on section 7 and 6 of the Civil Procedure Act which I need not multiply. *Res judicata* also applies to applications made in a suit, except applications which are made on totally different grounds and are not caught in the holding of Wigram V.C. in **Henderson –v- Henderson (1843) 3 Hare 100**thatrequires the parties to litigation to

bring forward their whole case,may not be trapped by *res judicata.* See **Civil Appeal No. 36 of 1996 Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others,** the Court of Appeal held *inter alia*;

> "**There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for a rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of a similar nature that is further, wider principles of res judicata apply to applications with the suit. If that was not the intention we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed.**"

[15] Given the circumstances of this case, I may as well state as was stated in the case of **NishitYogendra Patel v Pascale MirreileBaksh& Another** referred to in **Magnate Ventures Ltd & Another v City Council of Nairobi & 2 Others [2013] eKLR**, that;

> **"…the application…is an abuse of the Court process, as stated earlier, by pursuing same remedies in parallel courts which are competent to deal with the application. Such conduct must be deprecated and discouraged."**

[16] Accordingly, the proper forum is the processes already initiated in the other cases and my view is that resolution will come from the case in which the order for deposit was made. Appropriate orders should be sought and recorded in the primary case which compromises the case and, thereafter, I am sure that release of security deposited therein will be almost invariable unless for any justifiable reason the court orders otherwise. The issue of representation will also be sorted out and the other issues on advocate-client fee will follow the course. The more independent suits are filed on this subject of the security deposit, the more entangled the entire issue becomes. This application is not, therefore, the correct way of dealing with the issue. I stated that it may as well be an abuse of the process of the court. In the premise and in consideration of the foregoing, the application is without merit, and I hereby dismiss it with costs to the 1st Defendant. In making this order, I am aware that the 2nd Defendant may have to hold on to the account and the funds for a while. Whereas I sympathize with the plight of the Applicant, I hope the parties involved will observe the procedural rectitude that attend to such matters and resolve the issues in controversy.

Dated, signed and delivered in court at Nairobi this 24thday of June 2015.

F. GIKONYO

JUDGE